

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



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CRB No. 07-087

MULATUA GOBA,

Claimant–Petitioner,

v.

AU BON PAIN AND WAUSAU INSURANCE COMPANY,

Employer/Carrier–Respondent.

Appeal from an Order of
Claims Examiner Karen Bivins
OWC No. 622123

Heather C. Leslie, Esquire, for the Petitioner

Anita U. Ajenifuja, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, LINDA F. JORY, and FLOYD LEWIS, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).¹ Pursuant

¹Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers'

to § 230.04, the authority of the CRB extends over appeals from compensation orders, including final decisions or orders granting or denying benefits, by the Administrative Hearings Division (AHD) or the Office of Workers' Compensation (OWC), under public and private sector Acts.

BACKGROUND

This appeal follows the issuance of an "Award of Attorney's Fee" (Award), in which the Claims Examiner (CE) awarded an attorney's fee in the amount of \$1,050.02 for services rendered in connection with counsel's representation of Petitioner before this agency, which representation preceded Respondent's making payments of compensation requested by Petitioner, through her counsel. However, the CE denied Petitioner's request that the fee be assessed against Respondent, and instead, approved payment of the fee "from the compensation benefits paid to" Petitioner. The Award was filed on March 27, 2007.

Because the decision of the CE was not arbitrary or capricious, and was in accordance with the Act, we affirm.

ANALYSIS

In review of an appeal from OWC, the Board must affirm the order under review unless it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. See, 6 Stein, Mitchell & Mezines, ADMINISTRATIVE LAW, § 51.93 (2001).

As grounds for this appeal, Petitioner alleges that the CE erred by not assessing the fee against Respondent, because Petitioner contends Petitioner filed Forms 7 and 7A, being an "Employee's Notice of Accidental Injury or Occupational Disease" and "Employee's Claim Application", respectively "on or about" December 6, 2005, that Petitioner did not receive payment of her claimed temporary total disability benefits until March 6, 2006, more than the 14 days referenced in the notice printed on the copy of the form 7A that is presumably mailed by the Agency to the Respondent upon the Agency's receipt thereof, and more than 30 days after the receiving that written notice from the Mayor as set forth in D.C. Code § 32-1530 (a), and that therefore the fee ought to be assessed against Respondent pursuant to that code provision. In other words, Petitioner contends that Respondent is under an absolute obligation to have paid Petitioner the \$3,779.10 in temporary total disability referenced in the letter to the CE dated November 10, 2006 in support of the fee request, on or before January 6, 2006, or be assessed in addition to that amount, an attorney's fee.

Respondent objects to Petitioner's appeal, and argues that the denial of the assessment against Respondent is in accordance with the law because (1) D.C. Code §32-1530 (a) requires that an employer's declining to pay compensation be based upon a general denial of liability (i.e., a denial of compensability) in order to trigger employer liability for attorney's fees should the denial ultimately fail upon presentation to and resolution by the Agency adverse to the employer, which is not what occurred in this case, and (2) that code provision has no application in the absence of an award of compensation, and since the payment in this case was voluntary as opposed to pursuant to

an award, there can be no assessment against Respondent in this case based upon Petitioner's receipt of these benefits.

We agree with both arguments.

D.C. Code § 32-1530 (a) reads as follows:

If the employer or carrier declines to pay any compensation on or before the 30th day after receiving written notice from the Mayor that a claim for compensation has been filed, *on the grounds that there is no liability for compensation within the provisions of this chapter*, and the person seeking benefits thereafter utilizes the services of an attorney-at-law in the *successful prosecution* of his claim, there shall be awarded, *in addition to the award of compensation*, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the Mayor ... (emphasis supplied) .

The scenario contemplated in this provision envisions a denial of a claim which results in a dispute, the resolution of which is an award of compensation. In order for there to be "an award of compensation" (as opposed to payment "of compensation without an award" as is contemplated and covered by subsection (b) of §32-1530), there must be a Compensation Order. Such an order can only come about as a result of Agency action (after a "successful prosecution") through the issuance of a Memorandum or Recommendation issued by the Office of Workers' Compensation (OWC) following an informal conference which thereafter becomes a final order, or following a formal hearing conducted by the Administrative Hearings Division (AHD).

In this case, payment of compensation was made "without an award"; there is no evidence referenced in the Agency file that Respondent "declined" at any time to pay compensation for any reason other than the need to verify the nature and amount of the benefits sought; certainly there is no indication in the record that Respondent has ever asserted that "there is no liability for compensation (for this injury) within the provisions" of the Act.

The provision does not concern itself with mere late payment, or with delays in payment, whether reasonable or unreasonable; those situations are subject to other provisions in the Act, which establish specific penalties for such delays and/or lateness. Thus, D.C. Code § 32-1515 (e) and (f), provide for 20% and 10% penalties for late payments either with or without an award, respectively, and § 1528 (b), provides for an enhanced compensation rate to claimants in cases where there are unreasonable delays, in bad faith, by employers in making payments of installments of compensation.

In contrast, the attorney's fee provision under consideration herein contemplates an assessment of an attorney's fee against an employer where there is a dispute as to compensability initially (which is the meaning of "on the grounds that there is no liability for compensation within the provisions of this chapter" found in subsection (a)), or entitlement to additional benefits beyond those to which an employer has voluntarily agreed to pay (subsection (b)), which dispute requires representation by an attorney in a proceeding before the Agency which results in an award. This provision is intended to

encourage *voluntary* payment of benefits, not *timely* payments, which are encouraged by the other provisions described above.

Although the Award in this case did not explicitly articulate these rationale for the denial of the requested assessment, the statement that the denial was due to there having been a settlement of the issues prior to the informal conference carries with it the necessary implication that the denial was premised upon there having been no award of compensation, since there was no informal conference from which such an award could emanate.

Petitioner argues that the facts in this case are the same as the facts in *Guerrero v. Clark Construction Co.*, CRB No. 04-066, OWC No. 592187 (May 19, 2006), and that under that decision, the requested attorney's fee should be awarded.

Guerrero was a remand to OWC for clarification as to whether the employer had "declined to pay any compensation", or whether there had been an initial acceptance and payment of compensation, followed by a dispute as to whether additional compensation was owed. The CE in that case was then directed, upon so determining the foregoing facts, to analyze which provision, subsection (a) or subsection (b) of D.C. Code § 32-1530 was applicable and to thereupon consider the requested assessment accordingly. That case does not stand for the proposition that any failure to pay benefits within either the 14 or 30 day periods results in an assessable attorney's fee against an employer. Indeed, nothing in this record suggests Petitioner ever articulated a specific amount of compensation to be paid within 30 days of filing the forms 7 and 7A. How an employer is expected to glean what benefits are sought from the materials in the OWC file is not apparent. Neither of the forms upon which Petitioner bases the contention that a claim was presented which Respondent declined to pay contains a request for a specific benefit amount, or for benefits covering a specific period of time. It is, of course, always Petitioner's burden to establish entitlement to the level of benefits sought, (*Dunston v. District of Columbia Dept. of Employment Serv's.*, 509 A.2d 109 (1986)), presumably including entitlement to an assessment against an employer for an attorney's fee. Petitioner has not shown that Respondent denied compensability of the claim, declined to pay benefits claimed because of that denial of compensability, or that Petitioner obtained an award of benefits due to an attorney's service on Petitioner's behalf thereafter.

We take it as established by the District of Columbia Court of Appeals that the assessment of an attorney's fee against an employer is a matter to be considered strictly within the language of the Act. See, *National Geographic Society v. District of Columbia Dept. of Employment Serv's.*, 721 A.2d 618 (1998). Petitioner would have us read into the Act the authority to impose such an assessment for what amounts at most to lateness or delay in payment of temporary total disability benefits in an otherwise uncontested case, which we decline to do.

Accordingly, the decision of the CE was proper and in accordance with the Act.

CONCLUSION

The denial of an assessment of an attorney's fee against Respondent was neither arbitrary nor capricious, and is in accordance with the law.

ORDER

The Award of Attorney's Fee of March 27, 2007 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

May 23, 2007
DATE